IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976
NO. 76-5856

WINSTON M. HOLLOWAY,
RAY LEE WELCH, AND
GARY DON CAMPBELL — PETITIONERS

VS.

STATE OF ARKANSAS — RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

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ATTORNEYS FOR RESPONDENT

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OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at Holloway v. State, 260 Ark. ___, ___ S.W.2d ___ (July 10, 1976).

JURISDICTION

Petitioner has invoked the jurisdiction of this Court under 28 U.S.C. §1257(3).

CITATIONS

QUESTIONS PRESENTED

1. Whether the three (3) defendants (petitioners) were denied effective assistance of counsel by the order of the court appointing a public defender to represent them in the same trial over their objections?
2. Whether the defendants' trial in jail clothing destroyed their presumption of innocence so as to deny them a fair trial?

ARGUMENT

The issues in this case have been narrowly drawn and the judicial review has been sufficient to not warrant further review by this Court. The issues, entitlement to severance and the wearing of jail clothes when summoned for trial, upon their face raise obvious questions of constitutional right deprivations but the overall development of these issues within the specifics of the proceedings amply demonstrate that a proper disposition was made thereon and the issues do not require additional review.

I.

Whether the three (3) defendants were denied effective asssistance of counsel by the order of the court appointing a public defender to represent them in the same trial over their objections?

The Sixth Amendment to the United States Constitution guarantees to the accused in a criminal proceeding the assistance of counsel for his defense and this Court has often held that it is a fundamental safeguard necessary to protect the accused within the panoply of rights accorded under the Constitution and the dictates of a fair and impartial tribunal. The import of that Amendment and the Court's holding, however, is not the equivalent of the petitioner's implied interpretation that each accused is entitled to separate counsel, regardless of the advantages of such a requirement. To the contrary this Court has held that the ". . .'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests." Glasser v. United States, 315 U.S. 60, 70 (1942).

The issue for decision in this case, then, is whether or not there were such conflicting interests between the respective defendants that one attorney could not adequately protect their varied interests in his collective representation. Petitioners have not demonstrated or identified the alleged conflicting interests either in their present petition or before the Arkansas courts. The sole statement before this Court is as follows:

> "This [the discussion with the individual petitioners] prevented the public defender from examining them as to matters they had confided in with him when they took the witness stand where it conflicted with information he had received from the other two when they took the witness stand." (Petitioner's Petition at 3)

These vague allegations cannot supplant the requirement of "conflicting interests" that would impair their effective assistance of counsel.

At the trial of the cause all three(3) petitioners took the stand in their own behalf and the record reflects their respective testimony to be as follows:

(1) Winston Holloway alleged, in accordance with the testimony of his brother, that he was at his brother's home during the time of the robbery/rape incident caring for his brother who was recuperating from surgery; and

(2) Ray Lee Welch testified that he was at home during the entire night of the crime with his half-brother, the co-defendant Gary Don Campbell; and

(3) Gary Don Campbell testified that he had never been to the restaurant where the robbery/rape took place, that he had never made a contrary statement to the police about his complicity and that he didn't know Winston Holloway by name.

All three (3) defendants also testified that the victims lied when they made positive identifications of them as the criminal offenders responsible for the robbery and rapes that took place. In short, there was no conflict whatsoever in their testimony that demonstrated a need for separate representation. All three alleged alibis and two of them supported the alibi for each other.

Numerous courts have found this situation to be controlling because concurring and complimentary defenses deny the existence of an actual

conflict. See, People v. Cannedy, 270 Cal. App. 2d 669, 76 Cal. Rptr. 24 (1969), Meyers v. State, 248 S.C. 539, 151 S.E.2d 665 (1966), Gonzales v. United States, 314 F.2d 750 (9th Cir., 1963), People v. Dickens, 19 Ill. App. 3d 419, 311 N.E.2d 705 (1974), State v. Andrews, 106 Ariz. 372, 476 P.2d 673 (1970), People v. Spencer, 45 Mich. App. 440, 206 N.W.2d 733 (1973); Commonwealth v. Heard, (Pa. Super.,1973), 303 A.2d 831. Generally, see "Separate Counsel", 34 ALR 3d 470, §6(d).

The only development at trial which could have given rise to conflicting interests was the admission in evidence of an oral statement by petitioner Campbell wherein he stated that he and two other people went by cab to the restaurant and held it up, but that he had nothing to do with the rapes. However, the defendant Campbell denied having made any such statement, alleged that he was under the influence of drugs when the alleged statement was made, and, in every respect repudiated its making and the essentials of it. Under similar circumstances numerous jurisdictions have found no actual conflict sufficient to predicate severance or reversal. See, McHenry v. United States, 420 F.2d 927 (10th Cir.,1970), Frazier v. State, 287 So. 2d 386 (Fla. 1973).

Therefore, the petitioners are pressing in this case for the establishment of a per se violation of the Sixth Amendment every time multiple criminal defendants are appointed but one counsel to represent them. The advantages of such a requirement are obvious, but the mere identification of advantage does not give rise to a per se denial of

effective counsel or due process of law when there is joint representation of co-defendants. See, United States v. Williams, 429 F.2d 158 (8th Cir., 1970), and the cases cited therein at 160-161.

Petitioners' allegation may, too, be taken to argue for a per se rule whenever the joint representative of the co-defendants confronts the trial court with the possibility of a conflict of interest arising during the course of the trial. In this case the joint representative of the petitioners stated to the trial court in his pre-trial motion, "that the defendants have stated to him that there is a possibility of a conflict of interest in each of their cases . . . ." In keeping with the absence of a per se violation because of joint representation there is a duty upon counsel requesting severance or the appointment of multiple counsel to identify with specicity the nature of the conflict that will arise or, at least, assure the court that a conflict is imminent. The Eight Circuit Court of Appeals was faced with a similar situation where the joint representative informed the court that "possible conflicts of interest might arise in the future . . . ." Williams, supra at 160. The court there held the possibility of "in futuro" conflicts were little more than a "bald and conclusory statement" of counsel and without a per se violation doctrine such statements would not predicate a finding of error for the denial of additional counsel by the court. This holding is consistent with the analysis of (Glasser, supra, that an actual conflict must be shown to exist or that it is reasonably foreseen. In Lugo v. United States, 350 F.2d 858, 859 (9th Cir., 1965), the court stated:

> "All the cases cited to us by appellants involved obvious conflicts of interest, and while we cannot indulge in nice calculations about the amount of prejudice which results from a conflict of interest [Glasser, supra], neither can we create a conflict of interest out of mere conjecture as to what might have been shown."

Therefore, the petitioner's have not shown an actual or even prospective conflict of interest and without a per se violation arising upon the joint representation of codefendants there is no issue essential to this Court's review.

II.

WHETHER THE DEFENDANTS' TRIAL IN JAIL CLOTHING DESTROYED THEIR PRESUMPTION OF INNOCENCE SO AS TO DENY THEM A FAIR TRIAL?

As in the previous argument, considered facially, the argument of the petitioners raises a constitutional issue well within the parameters of previous decisions of this Court. Further, respondent cannot condone or in any manner vouch for the propriety of the conduct giving rise to the issue. Defendants should not be tried in the obvious attire of their incarceration regardless of the lack of its specific designation as prison attire - when three (3) defendants wear identical uniforms of blue pants and blue shirts the origin is manifest with or without numbers or the name of the institution emblazoned thereon.

However, the facial aspects of the petitioners' argument is not solely controlling nor does their argument accurately depict the total circumstances.

The petitioners have reproduced but a part of the total pretrial colloquy and the portion omitted is critical. Immediately following that reproduced exchange the trial court offered the defendants an opportunity, reasonable continuance, to change their clothes which the defendants did not take advantage of, and upon continued discussion of the clothes issue the trial court again said he had no objection to their changing clothes. Respondent would submit that it is reflected upon the basis of the record that the opportunity existed to remedy the situation, a reasonable continuance was offered for that purpose, the court offered to admonish

the jury in furtherance of the purpose, and the defendants, though present, refused every opportunity presented. It is the position of respondent, then, that the petitioners waived the error and certainly were not compelled to appear for trial in jail attire.

This Court has recently held that a defendant's constitutional rights were violated only when he was compelled to be tried while dressed in distinctive or identifiable prison attire. Estelle v. Williams, 425 U.S. ___, 48 L.Ed.2d 126, 96 S.Ct. 1691 (May 3, 1976). It is regretable that the prospective jurors saw and recognized the defendants before the trial so dressed, if they did, and the record does not so reflect, but there was no state engendered compulsion for their trial to be so held, and every reasonable provision was attempted to eliminate the problem. The petitioners' failure to take advantage of the trial court's proposals negates any compulsion and converts their trial in jail clothing into a volitional and deliberate act. Surely, the precepts of a fair trial and the holding of Estelle, supra, have not been abrogated under the circumstances. Too, the situational distinction between being compelled to go to the courthouse in jail clothes and being compelled to go to trial so dressed cannot permit the latter to be bootstrapped to the former and thereby arise to error. There is no logic to the concept because there is no trial in the former instance and the court has no control over the uncontrolled observations of the jury. It is just as if a prospective juror were to see the defendant brought into the back door of the courthouse while manacled and controlled by policemen - the viewing

is not of the state's making except by the coincidence of timing and it is not the trial.

The petitioner's argument when viewed in its totality does not warrant this Court's review.

CONCLUSION

This Court should deny the petitioner's application for a Writ of Certiorari where the specifics of the argument, the circumstances, and the law deny its efficacy as a claim of merit or demanding of this Court's review.

Respectfully submitted,

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